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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	)	
	)	
Review of the Commission's Regulations Governing Television Broadcasting	)	MM Docket No. 91-221
	)	
Television Satellite Stations Review of Policy and Rules	)	MM Docket No. 87-7
	)	
Broadcast Television National Ownership Rules	)	MM Docket No. 96-222
	)	
Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests	)	MM Docket No. 94-150
	)	
Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry	)	MM Docket No. 92-51
	)	
Reexamination of the Commission's Cross-Interest Policy	)	MM Docket No. 87-154

To the Commission:

COMMENTS OF PAXSON COMMUNICATIONS CORPORATION

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February 7, 1997

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SUMMARY OF ARGUMENT

The Commission should give practical recognition to the radical changes in the communications marketplace by aligning its broadcast ownership and attribution rules with contemporary competitive conditions.

Television Duopoly Rule. The Commission should revise the television duopoly rule to prohibit only common ownership of television stations in different DMAs. There should be no additional contour-based test. The Commission itself has characterized its existing Grade B overlap test as "overly restrictive." A Grade A overlap test would be similarly restrictive: it does not reflect market realities. DMAs, not service contours, delineate stations' core markets and thus should be the focus of ownership regulations. Viewers in a DMA identify with DMA stations, not with other stations that may provide technical (but not program) service to their area.

A new DMA-based standard should allow continuing common ownership of stations whose ownership complied with FCC rules when they were acquired.

-- Exceptions. UHF/UHF and UHF/VHF combinations should be permitted, regardless of contour overlap or market location. UHF stations continue to experience significant competitive handicaps (that will be exacerbated if must-carry requirements are eliminated). Common ownership of UHF stations will permit them to exploit economies of scale to enhance their public service capabilities. Alternatively, the Commission should at least permit UHF/UHF combinations, combinations involving UHF stations that are not affiliated with a major network, and combinations in any market having at least four independently-owned commercial and noncommercial television stations.

The satellite exception should be continued.

-- Waivers. As an alternative to exceptions, waivers should be available where one of the stations is not affiliated with a major network; where there are at least four other independently-owned commercial or noncommercial television stations in the market; in situations involving failed stations; and for applicants for vacant channels and new allotments.

Waivers should also be available in other situations if applicants propose programming and other commitments that represent extraordinary public service. There should be no pre-established criteria for such waivers; rather, the Commission should indicate the types of factors that will be considered, including children's and minority programming commitments, minority/female employment benefits, and service to unserved communities.

Radio/Television Cross-Ownership. The Commission should eliminate the one-to-a-market rule and rely instead on its separate radio and television duopoly rules to ensure local competition and diversity. The ever-increasing variety in the media marketplace -- print media, cable systems (often with more than 100 channels), DBS, electronic communication as well as conventional broadcast stations -- means that the radio and television duopoly rules, standing alone, will ensure full competition and diversity. The possibility of a monolithic voice dominating a local market is patently absurd in today's cacophonous media chorus.

-- Modification. If the Commission nonetheless retains the one-to-a-market rule in some form, it should permit ownership of one television station and up to the maximum number of radio stations permitted by the radio duopoly rules so long as a minimum of 20 independently-owned voices remain in the market. The Commission has conceded that its 30-voice standard is conservative. Twenty voices is a more accurate measure of minimally acceptable competition and diversity. Reflecting the terms of Commission ownership restrictions, voices should include cable, MMDS, daily newspapers and commercial and noncommercial broadcast stations. There should be no market size component, as 20 voices is 20 voices no matter what the market size. market.

If a five-factor waiver test is retained, its narrow focus on selected pre-established criteria should be replaced by general categories of showings that will be considered, depending on the particular circumstances presented.

Television LMAs and JSAs. Congress and the Commission have both acknowledged the public interest benefits of JSAs and LMAs. That recognition should be embodied in a decision not to subject such arrangements to additional Commission regulation. Such an outcome would be particularly inappropriate in the case of JSAs, which involve only one aspect -- sales -- of station operation and thus have no impact on diversity. Any television LMA attribution standards should be limited to the general radio LMA guidelines, and should be triggered based on the amount of locally-produced programming provided by the broker. New LMA or JSA attribution standards should not apply for purposes of other Commission ownership restrictions.

-- Grandfathering. Existing LMAs and JSAs must be grandfathered. Parties to such agreements acted in reasonable reliance on an existing regulatory structure. It would be unfair and contrary to judicial requirements to impose new attribution standards on a retroactive basis to require their premature termination or prohibit their transfer. This is not a case of first impression and failure to grandfather would be a radical departure from past practice and precedent. Parties entered into agreements in good faith reliance on Commission rules. Failure to grandfather would burden both the parties to existing agreements and the public they serve.

Finally, there is no statutory interest in a failure to grandfather -- to the contrary, Congress has expressly directed the Commission to grandfather existing LMAs.

National Television Ownership Rule -- UHF Discount. UHF stations continue to operate under significant practical handicaps that must be acknowledged in retention of the national television ownership rules' UHF discount.

-- DMA Households. DMA households should be used in calculating national audience caps.

-- Satellite Exception. The satellite exception to the national television ownership rule should be continued.

Attribution Rules. The Commission should adopt an equity plus debt gloss on attribution only for the four major networks. The situations prompting the Commission's proposals involved the networks, and there is evidence supporting extension of the proposal to other entities. Voting stock benchmarks should be increased to 25% for both stockholders and passive investors.

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To the Commission:

COMMENTS OF PAXSON COMMUNICATIONS CORPORATION

Paxson Communications Corporation ["PCC"],[1] by its attorneys, submit these Comments in the above-captioned proceedings.[2]

1/ PCC is the parent of the licensees of 22 television stations, and is party to 13 television LMAs. It thus has substantial experience with respect to, and interest in, the issues presented in the above-captioned interrelated proceedings.

2/ Review of the Commission's Regulations Governing Television Broadcasting, Second Further Notice of Proposed Rule Making, MM Dockets Nos. 91-221, et al., FCC 96-438 (Nov. 7, 1996) ["Second Notice"]; Broadcast Television National Ownership Rules, Notice of Proposed Rule Making, MM Dockets Nos. 96-222, et al., FCC 96-437 (Nov. 7, 1996) ["National Ownership Notice"]; Review of the Commission's Regulations Governing Attribution of

INTRODUCTION

It is restating the obvious to recite the vast differences between the television industry that existed when current television ownership and attribution rules were adopted[3] and the multichannel video marketplace of 1997. It is stating the obvious to observe that it is time for the Commission to acknowledge those changes by modifying its antiquated television ownership and related rules to place television on a more level playing field with its multichannel media competitors.

Recent actions highlight the inequity of continuing to burden local television stations with outdated ownership limitations while competitors flourish without similar restrictions. Congress and the Commission have permitted expanded common ownership of local radio stations.[4] There are minimal limits on national cable system ownership and on the number of subscribers which a cable system may serve in a community in a region.[5] There are no limits

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Ownership Notice"]; Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, Further Notice of Proposed Rule Making, MM Dockets Nos 94-150 et al., FCC 96-436 (Nov. 7, 1996) ["Attribution Further Notice"].

3/ See, e.g., Multiple Ownership of Standard, FM and Television Broadcast Stations, 45 FCC 1476, recon. granted in part, 3 RR 2d 1554 (1964).

4/ Revision of Radio Rules and Policies, Report and Order, MM Docket No. 91-140, 7 FCC Rcd 2755 (1992), recons., 7 FCC Rcd 6387 (1992); Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996 (Broadcast Radio Ownership), 11 FCC Rcd 12368 (1996).

5/ Development of Competition and Diversity in Video Programming Distribution and Carriage, First Report and Order, 8 FCC Rcd 3359 (1993).

on DBS ownership. Telephone companies may provide video services within their service areas.[6]

Local television stations, however, continue to be restricted by decades-old ownership restrictions that impair their ability to compete effectively with other video program providers that enjoy the added advantage of multiple channels. As their competitors continue to gain alternative avenues for program and service delivery, television stations, limited to a single one-lane road to the home, will be left abandoned beside the information superhighway unless they are free to optimize the economies of scale and operational efficiencies that more liberal ownership regulations would permit.

Commission decisions now routinely rely on today's ever-increasing media diversity and competition in waiving ownership restrictions specific markets.[7] This anecdotal recognition of modern marketplace conditions should receive tangible across-the-board application through realistic modifications of Commission television ownership restrictions.

THE COMMISSION SHOULD PERMIT COMMON OWNERSHIP OF TELEVISION STATIONS IN SEPARATE DMAs, REGARDLESS OF CONTOUR OVERLAP

The television duopoly rule[8] is premised on the Commission's longstanding -- but never proven -- assumption that diversity of opinion is inversely proportional to the number of owners

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6/ Telecommunications Act of 1996, 47 U.S.C. §§ 651, 653; see Bell Atlantic-New Jersey, Inc. Certification to Operate an Open Video System, 11 FCC Rcd 13249 (1996).

7/ See, e.g., Stockholders of Infinity Broadcasting Corporation, FCC 96-495 (December 26, 1996); Stockholders of CBS Inc., 11 FCC Rcd 3733 (1995).

8/ 47 C.F.R. § 73.3555(b) (1996).

in a given market. In resolving this proceeding, the Commission should acknowledge the real world of economic necessity and recognize that it is both economically and practically irrational for an owner of multiple stations that serve some common areas to operate and program those stations in a monolithic manner. A station owner seeks to maximize revenues, and will do so for each station he or she owns. It is absurd to suggest that an owner of multiple stations will operate them less efficiently than multiple owners: all station owners seek to maximize revenues through optimally responsive and efficient programming.

-- Geographic Scope. The Second Notice recognizes that the television duopoly rule's current Grade B overlap standard is "overly restrictive." Second Notice para. 12. It proposes to replace it with a twofold standard: common ownership would be permitted if there is no Grade A contour between two television stations *and* the stations are located in different DMAs. PCC respectfully urges the Commission instead to permit common ownership if two television stations are located in different DMAs, regardless of Grade A contour location.

Both the ADI (developed by Arbitron) and the DMA (developed by A. C. Nielsen Company) are market concepts that assign every county (or, in some cases, discrete portions of counties) to a particular television market based on market stations' measured viewing patterns.[9/] Commercial television market designations (the DMA and its predecessor, the ADI) have long

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9/ "The Designated Market Area (DMA) is a geographic market design that defines each television market exclusive of others, based on measured viewing patterns. Each market's DMA consists of all the counties in which the home market stations receive a preponderance of viewing, and every county is allocated exclusively to one DMA -- there is no overlap. The total of all DMAs represents the total television households in the U.S." BROADCASTING & CABLE YEARBOOK 1996 C-153 (1996).

been used in Commission rules, particularly ownership rules, that require an accurate measure of, or reference to television stations' actual market areas.

For example, ADIs were used to determine what stations were subject to the Commission's now-deleted "Top 50 market policy"[10/] and its Prime Time Access Rule.[11/] ADIs are used in determining the area within which channel 6 television stations are protected from interference from noncommercial educational FM stations. 47 C.F.R. § 73.525(e)(3)(iii). ADI television households are used to determine compliance with television national audience caps. 47 C.F.R. § 73.3555(e)(2). A station's ADI assignment determines its eligibility for a waiver of the one-to-a-market rule. 47 C.F.R. § 73.3555 n. 7(1). National networks' cable system ownership is restricted with reference to location within an ADI. 47 C.F.R. § 76.501(b)(2)(ii). Finally, stations' ADI assignments have long determined carriage and exclusivity rights under the Commission's cable television rules. See former 47 C.F.R. §§ 76.57 - 76.63; 76.151; 47 C.F.R. § 76.51.[12/] In short, the ADI (and now the DMA[13/]) is a recognized, established, accurate,

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10/ See Multiple Ownership of Television Broadcast Stations, Report and Order, Docket No. 16068, 22 FCC 2d 696 (1968).

11/ 47 C.F.R. §§ 73.658(k) (repealed, Prime Time Access Rule, 78 RR 2d 1076 [1995]), 73.662.

12/ See also Satellite Compulsory Extension Act of 1994, S. Rep. No. 103-107, 103rd Cong., 2d Sess. 15 (1994) [DMAs or other accepted measure used to determine markets for copyright purposes].

13/ See ValueVision International, Inc., 2 C.R. 832 (1996) [DMAs are substitutes for ADIs]. The Commission has expressly recognized that the DMA's design and use are identical to that of the ADI. Definition of Markets for Purposes of the Cable Television Mandatory Television Broadcast Signal Carriage Rules, Notice of Proposed Rule Making, CS Docket No. 95-178, 11 FCC Rcd 1904, 1905 (1995).

realistic measure of a television station's actual market, long used in Commission regulations. As such, it is eminently well-suited as the controlling geographic standard for a modified television duopoly rule.

Congress has expressly recognized that the ADI -- now the DMA -- accurately measures the area in which stations impact diversity and economic competition. The 1992 Cable Act[14/] directs use of a market measure based on Section 73.3555(d)(3)(i) of the Commission's Rules to determine stations' mandatory carriage rights.[15/] Congress' requirement was based on its recognition that "ADI [DMA] lines establish the markets in which television stations buy programming and sell advertising" and its conclusion that "ADI lines are the most widely accepted definition of a television market and more accurately delineate the area in which a station provides local service than any arbitrary mileage-based definition."[16/]

The Commission, too, has consistently recognized that DMAs (ADIs) truly reflect stations' markets in granting waivers of its ownership rules to stations assigned to different DMAs (ADIs) notwithstanding Grade B contour overlap. See, e.g., Thomas J. Flatley, 7 FCC Rcd 4292 (1992); Capital Cities/ABC, Inc., 11 FCC Rcd 5871 (1996); WHOA-TV, Inc., FCC 96-458 (Dec. 10, 1996); KNSD License, Inc., DA 96-1848 (Nov. 7, 1996); Act III Communications Holdings, L.P., 11 FCC Rcd 4029 (1996); Cincinnati TV 64 Limited

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14/ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

15/ Redesignated Section 73.3555(e)(3)(i), this provision uses ADIs to measure a television station's audience reach.

16/ Cable Television Consumer Protection and Competition Act of 1992, H.Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).

Partnership, FCC 96-302 (July 16, 1996); Weigel Broadcasting Company, FCC 96-204 (May 17, 1996). These Commission decisions recognize that DMAs accurately describe television stations' markets. DMAs, in other words, delineate precisely those areas that logically should be the focus of the agency's television ownership regulations.

Modification of the duopoly rule to permit common ownership of stations assigned to different DMAs regardless of contour overlap would advance explicit Congressional and Commission recognition that DMAs accurately describe the areas within which television stations compete. Advertising and programming are bought and sold based on DMAs, not on service contour location. Viewers within a DMA identify with stations assigned to that DMA -- that is the essence of the DMA's definition, which depends on preponderance of viewing. They do not identify with or significantly view stations that may provide technical -- but not programming or advertising -- service to their areas.[17/] Both Congress and the Commission recognized this fact of television life in tying mandatory carriage rights to location within an ADI (DMA). Similar recognition must guide the Commission's decision here.

DMA assignment, which is a direct function of viewership and thus competition for advertisers, constitutes a logical and rational standard for application for ownership rules. They are definite and readily definable. In other words, as they have in other rules, DMAs provide an ideal administrative tool for realistically revised Commission ownership regulations.

17/ For example, Baltimore stations provide Grade A or B coverage to portions of the Washington, D.C., DMA (and vice versa) but do not carry local Washington, D.C. news.

-- No Additional Grade A Contour Standard. The Second Notice appears to recognize that DMAs accurately define stations' markets. Second Notice paras. 14 et seq. Yet it also proposes a supplemental -- but unnecessary -- requirement that would permit common ownership only if stations' Grade A contours do not overlap. This twofold test is unnecessary: the definition of a DMA -- counties in which stations receive a majority of local viewing -- necessarily ensures that stations in different DMAs do not significantly compete, regardless of the location of their service contours.

Congress has concluded that DMAs delineate stations' actual market areas. Absent extraordinary relief, stations in different DMAs are not carried by, and thus do not compete for viewers or advertisers on, the same cable systems. This cable competitive arena replicates the off-air competitive environment: as a practical matter, stations in one DMA do not compete with stations in another.

The Commission itself acknowledges this reality: as noted above, it has routinely waived its television duopoly rules to permit common ownership of stations in different DMAs notwithstanding their overlapping service contours, accurately recognizing that contour overlaps are less significant measures of actual competition and diversity than DMA locations. See cases cited supra. This recognition must be continued in the rule adopted in this proceeding.

-- Common Ownership in Large DMAs. The one instance in which a Grade A contour test might be appropriate involves large DMAs. See Second Notice para. 26 et seq. PCC suggests that the Commission adopt a policy granting waivers of a new DMA-based television duopoly rule if applicants demonstrate that there was no Grade A contour overlap between stations assigned to the same DMA.

-- Waivers of the Grade A Contour Requirement. If the Commission nonetheless adopts the Grade A contour as a second component of its television duopoly rule,[18] it should establish reasonable waiver standards for stations in different DMAs whose Grade A contours overlap. In particular, waivers of the Grade A contour requirement should be available to stations in different DMAs in the following circumstances:

-- the extent of Grade A overlap does not exceed either 10% of the total population *or* 10% of the total area served by the affected stations;

-- there will be a total of 8 other independently-owned television "voices"[19] in the DMAs served by the stations; or

-- the applicants can demonstrate that waiver will generate significant efficiencies, economies, or public service benefits.[20]

Given the fact that a Grade A overlap requirement is superfluous at best, a reasonable waiver standard is necessary to protect the integrity of the rule. The above waiver criteria, which would apply only if stations are in different DMAs and therefore do not compete for audience and advertisers, will guarantee more than sufficient competition and diversity to protect the Commission's concerns in those areas.

18/ Consistent with the Commission's past practice, applicants should be permitted to use either predicted or measured contours to demonstrate compliance with any Grade A contour overlap standard that is adopted.

19/ As discussed infra, "voices" should include both commercial and noncommercial educational television stations.

20/ See discussion infra.

-- Exceptions -- UHF Stations. Any modified television duopoly rule should include exceptions for combinations involving UHF stations (either UHF/UHF or UHF/VHF). If the Commission is disinclined to create exceptions for all UHF stations, this exception should at a minimum apply to UHF/UHF combinations; those involving UHF stations that are not affiliated with any network that qualifies as such pursuant to Section 73.662(f) of the Commission's Rules; or in situations in any market having at least four independently-owned commercial or noncommercial television stations.[21/]

The record in this proceeding is replete with documentation that UHF stations continue to operate under a significant practical handicap; additional statistical documentation of that well-recognized fact would be superfluous. See Second Notice para. 39; National Ownership Notice paras. 13, et seq.; Comments of the Association of Independent Television Stations, Inc., MM Docket No. 91-221 (May 17, 1995) at 24 - 29. UHF stations' service areas are generally not as large as those of VHF stations, reflecting the fact that UHF signals are more subject to terrain blockage than VHF signals.[22/] Eliminating the UHF handicap would require a change in the

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21/ "A *television network* is any person, entity, or corporation providing on a regular basis more than fifteen (15) hours of prime time programming per week (exclusive of live coverage of bona fide news events of national importance) to interconnected affiliates that reach, in aggregate, at least seventy-five (75) percent of television households nationwide; and/or any person, entity, or corporation controlling, controlled by, or under common control with such person, entity, or corporation. Not included within this definition is any television network formed for the purpose of producing, distributing, or syndicating program material for educational, noncommercial, or public broadcasting exhibition, or for non-English language exhibition, or that predominately distributes programming involving the direct sale of products or services." 47 C.F.R. § 73.662(f) (1996).

22/ The reality of the resulting handicap is well recognized by broadcasters. See, e.g., Public TV Solution Not as Simple as V's, U's, BROADCASTING & CABLE, April 3, 1995, at 80.

immutable laws of physics. Even if UHF stations can achieve signal quality comparable to their VHF competitors, they can do so only at substantial expense, disproportionately increasing the cost of effective competition.

Most UHF stations are not affiliated with major networks[23/] and, in addition to higher operational costs and smaller service areas, must bear the added economic burden of acquiring or developing all of their programming. UHF stations must also overcome audience perceptions and established viewing habits. Many UHF stations have been forced to seek a special market niche by adopting special formats, a choice which adds to diversity but, because of the smaller audience reached, reduces profitability. Cable carriage helps to some extent, but cable subscribership is not universal, and not all cable systems carry all UHF stations.[24/] Should television stations' mandatory cable carriage rights be eliminated,[25/] UHF stations will suffer the most; many will not survive the economic chaos that could follow.

Congress has explicitly recognized the "technical and economic handicaps applicable to UHF facilities." House Report at 118. The House version of the Telecommunications Act of

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23/ The recent series of network affiliation switches reflected a scramble to obtain VHF affiliates; those networks that obtained VHF affiliates reaped a tangible financial reward for their success. See, e.g., Perelman Didn't Mean to Start a Revolution, BROADCASTING & CABLE, April 17, 1995, at 49; The Mixed Bag of Affiliate Switches, BROADCASTING & CABLE, April 24, 1995, at 15.

24/ The Commission may take official notice of the fact that the vast majority of ADI modification decisions in which cable systems have sought to avoid mandatory carriage obligations have involved UHF stations. See, e.g., Catawba Services, Inc., 10 FCC Rcd 13130 (1995); TKR Cable Company of Elizabeth, DA 95-2377 (Dec. 5, 1995); Tele-Media Company, 10 FCC Rcd 8615 (1995).

25/ National Ownership Notice para. 10, n. 25.

1996 was thus designed to "create[] a strong presumption in favor of UHF/UHF and UHF/VHF combinations." Id. at 119. The Commission itself has acknowledged that combinations involving UHF stations "may provide relatively greater public interest benefits and impose relatively fewer public interest costs" than those involving VHF stations.[26/] Such recognition has supported waivers of its one-to-a-market rules involving UHF television stations.[27/]

The decision in this proceeding should comport with Congressional and Commission acknowledgment of UHF stations' inherent disadvantages in technical characteristics, channel position and audience viewing habits and participation. As the result of these disadvantages, UHF stations are almost inevitably the weakest stations in their markets. Both Congress and the Commission have consistently recognized the tangible public interest benefits that common ownership permits. UHF stations must be permitted to exploit these economic efficiencies in order to survive the increasingly cutthroat competition of today's video marketplace.

The public interest supports a limited exception to any new television duopoly rule that permits combinations involving UHF stations.[28/] Creating such an exception will permit these

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26/ Broadcast Multiple Ownership Rules, Second Report and Order, MM Docket No. 87-7, 4 FCC Rcd 1741, 1753 recons. granted in part, denied in part, 4 FCC Rcd 6489 (1989). The Commission's staff, too, has recognized that elimination of the duopoly rule for certain UHF stations would comport with the public interest. OPP Working Paper, supra; 1 FCC Network Inquiry Special Staff, NEW TELEVISION NETWORKS: ENTRY, JURISDICTION, OWNERSHIP AND REGULATION, 64 - 77 (1980).

27/ See, e.g., S.E. Licensee G.P., FCC 96-464 (Nov. 27, 1996).

28/ Any UHF exception should not require a minimum market size: market size does not measure actual diversity or competition. A small market viewer of six independently-owned television stations has available the same amount of diversity as a large market viewer of six independently-owned television stations. Similarly, a small market advertiser choosing from among six independently-owned local television stations also has the same advertising choices as smaller and generally less successful stations to operate in a more efficient and cost-effective manner.[29/] It will facilitate diversity by permitting those UHF stations with a specialized format to continue to respond to the particular concerns of otherwise unserved groups of viewers. It will similarly facilitate competition be enabling once-weak stations to compete effectively not only with other television and radio stations but with their multichannel competitors. A UHF exception would, in short, contribute to diversity and competition by creating stronger competitors that are able to provide more and better public interest programming.

-- Exceptions -- Satellite Stations. The Commission correctly concludes that the satellite exception should be continued. Second Notice para. 37. The long-acknowledged benefits of satellite station operation have not changed,[30/] and eliminating the satellite exception would severely curtail service to already-underserved communities without any offsetting benefits. If a station qualifies for satellite treatment under current requirements,[31/] the practical alternative to prohibiting satellite operation is no service. The satellite exception must be continued.

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a large market advertiser choosing from among six independently-owned local television stations. Under the Commission assumptions that support its ownership restrictions, the number of independently-owned voices, not market size, measures diversity and competition.

29/ If UHF stations can become stronger as the result of duopoly ownership, this will have the added benefit of creating a viable station base for additional new networks.

30/ See Television Satellite Stations Review of Policy and Rules, Further Notice of Proposed Rule Making, MM Docket No. 87-8, FCC 90-279 (Sept. 18, 1990).

31/ Television Satellite Stations Review of Policy and Rules, Report and Order, 6 FCC Rcd 4212 (1991), pets. for recon. pending; 47 C.F.R. § 73.3555 n. 5.

-- Waivers. As an alternative to the above exceptions, the Commission should clearly articulate the circumstances in which waivers of its modified television duopoly rule will be available. PCC urges the Commission to grant routine waivers in the following circumstances:

-- Diversity. Waivers should be available where one of the stations is not affiliated with a network, as that term is defined in Section 73.662(f) of the Commission's Rules; and where there are at least 4 other independently-owned commercial and non-commercial television stations in the market. The market shares of stations would not be a factor, because the Commission's diversity analysis has consistently focused on the number, not the popularity, of independent voices.[32/]

In calculating the number of voices in a market, both commercial and noncommercial educational television stations must be considered. The Commission's diversity focus is tied to its concern with stations' coverage of local issues, news and public affairs.[33/] Noncommercial educational television stations provide substantial informational programming. They also seek financial support (in return for on-air acknowledgments that have impact similar to commercial advertising) from the same advertisers that utilize commercial stations. In these circumstances, it is irrational and unreasonable to exclude them from a calculation of available "voices" in particular markets.

32/ This is the appropriate focus because market share can fluctuate dramatically, reflecting changes in factors such as programming and audience references.

33/ See, e.g., Newspaper/Radio Cross-Ownership Waiver Policy, Notice of Inquiry, MM Docket No. 96-197, FCC 96-381 paras. 12, 14 (October 1, 1996).

-- VHF/VHF Combinations. Waivers should be available to permit VHF/VHF combinations in Alaska, Hawaii and Puerto Rico where one or both of the stations is not affiliated with a network, as defined by Section 73.662(f) of the Commission's rules.

-- Failed Stations. Waivers should be available in the case of a failed station -- a station that is involved in bankruptcy proceedings or has been off the air for four months or more. The Commission has long recognized the particular public interest benefits associated with waiving its ownership restrictions in the case of failed stations.[34/] There is no reason to change that policy under modified television ownership rules. Preservation of established television service clearly furthers the public interest and justifies waiver of ownership restrictions.

Waivers should also be available for stations that have been disadvantaged by the lack of cable carriage. Congressional must-carry requirements recognize cable carriage's critical importance to enabling stations to reach the audiences they are licensed and obligated to serve. A station that is denied cable carriage is just as handicapped as a station that faces bankruptcy -- in fact, bankruptcy can often be a direct consequence of lack of cable carriage. In such circumstances, waiver of ownership restrictions to permit stations denied cable carriage to take advantage of the efficiencies of common ownership is clearly consistent with the public interest.

There should be no requirement that a prospective owner demonstrate that it is the only possible qualified purchaser. The need for such a demonstration could delay the application

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34/ See, e.g., Meridian Broadcasting Partnership, 8 FCC Rcd 8399 (1993); Paramount Communications, Inc., 7 FCC Rcd 1390 (1992); Channel 33, Inc., 4 FCC Rcd 7674 (1988).

process and further delay -- or even jeopardize -- the return of service that is the waiver's ultimate goal. If an applicant is willing to assume the risks associated with assuming responsibility for a television station that has thus far been unable to compete successfully, there should be no need to demonstrate that the applicant is the only entity willing to do so. The public will benefit from restored or reinvigorated service regardless of the identity of the entity that makes it possible, and public benefit must be the touchstone of waiver decisions.

-- New Allotments. Waivers should also be available for applicants for vacant channels and new allotments. There is a long-recognized public interest in securing productive use of spectrum that would otherwise lie fallow.[35/] If available spectrum has not been developed in almost a half-century, it is highly unlikely that it can or will be utilized under normal regulatory conditions.[36/] To preserve it for possible future use by theoretical future applicants where there have been no applicants in the past is to exalt theoretical expectations over practical reality. An applicant willing to develop unused spectrum and serve the public should be permitted to do so pursuant to a waiver of ownership restrictions.

Such waivers should be entertained prior to adoption of a DTV Table of Allotments. The timetable for adoption of such a table is uncertain, and that action may well be followed by requests for reconsideration and judicial appeals. Given the practical uncertainty surrounding

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35/ See, e.g., Highlands Broadcasting Co., Inc., 9 FCC Rcd 5746 (1994); Satellite Television Service, Inc., 87 FCC 2d 598 (1981).

36/ Indeed, the scarcity rational that supports Commission ownership regulation, see FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978), does not apply in this situation. Far from having too many applicants for available spectrum, unused spectrum lacks interested users and is not "scarce."

implementation and widespread availability of DTV service, DTV-based delay in accepting individual ownership waiver requests will indefinitely delay the promise of new service. The Commission's waiver policy should be implemented immediately, without reference to DTV developments.

-- Public Interest Waivers. Television duopoly waivers should, finally, be available if applicants propose programming and other commitments that will produce extraordinary public service benefits. The Commission should not, however, establish rigid waiver tests like the five-factor waiver test now applied to one-to-a-market waiver requests.[37/] Instead, the Commission should indicate the general categories of public interest benefits that will be considered. Applicants would not be required to demonstrate each type of benefit, but rather would be permitted to select those benefits that are best suited to the market environment in which they propose to operate.

Among the benefits that should be acceptable are:

-- broadcast of more than three hours per week of "core" children's educational/informational programming, establishment of non-broadcast efforts to enhance the value of such programming, and/or development of locally-produced "core" children's programming;

-- broadcast of programming particularly designed to be responsive to the needs and interests of minority groups or other underserved persons within the station's marketplace;

-- broadcast of significant amounts of local news or public service programming;

37/ See Second Report and Order, MM Docket No. 87-7, 4 FCC Rcd 1741, recon. granted in part, denied in part, 4 FCC Rcd 6489 (1989).

- establishment of minority/female internship and training programs or establishment of scholarship programs for members of minority groups and women;
- commitments to utilize minority- or women-owned suppliers;
- contributions and other support for noncommercial educational radio and television stations to enable such stations to develop particular programming, including children's educational/informational programming, or training programs;
- establishment of studios and other facilities in unserved communities; and
- cost savings resulting from efficiencies that are applied to any of the above.

-- Grandfathering. Existing station combinations that do not conform to new rules adopted as the result of this proceeding should be grandfathered and allowed to be sold in combination without the need of additional showings. As discussed in greater detail below, the Commission has in the past grandfathered nonconforming ownership patterns when it has adopted more restrictive ownership requirements. Here, the Commission would be relaxing its ownership regulations. It would be ironic and irrational for a new, purportedly relaxed regulatory regime to prohibit combinations that would have been allowed under a prior more restrictive regime.

Further, if waivers of the new rules are granted, successful applicants should be permitted to sell the affected stations in combination and should not be forced to split them up. In the situations outlined above, successful waiver applicants will have assumed significant risks. It is true that they will have received a benefit in the form of relaxed ownership restrictions, but the cost of that benefit will have been assuming the risks of far from certain success in order to serve the public. An applicant seeking to take over a failed station will, for example, be trying to operate a facility that at least one (and possibly other) prior owners could not operate successfully. If the waiver applicant succeeds in doing so, he/she should not be penalized for successfully reviving a failed station by requiring a sale to separate owners. Indeed, such stations' past history suggests that such a requirement could merely set the stage for the need for additional waiver requests: if the two stations could not be operated separately in the past, it is illogical to assume that this would occur in the future.[38/] Common ownership permitted by waivers should be grandfathered upon sales of the stations.

THE ONE-TO-A-MARKET RULE SHOULD BE MODIFIED TO REFLECT THE TERMS OF THE RADIO AND TELEVISION DUOPOLY RULES

PCC urges the Commission to eliminate its one-to-a-market rule[39/] and rely instead on its separate radio and television duopoly rules to guarantee local competition and diversity. Each of the duopoly rules reflects a reasoned evaluation of the degree of common ownership that is consistent with the public interest. It is unnecessary and unwise to penalize television owners that may wish to own radio stations and radio owners that may wish to own television stations by restricting their ability to do so.

From an advertiser's point of view, radio and television, together with magazines, daily and weekly newspapers, cable television, outdoor advertising and other media are practical

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38/ In the case of satellite stations, for example, satellites are almost without exception uniformly transferred with their parent stations because independent, stand-alone operation continues to be infeasible. See, e.g., Newhouse Broadcasting Corp., 77 FCC 2d 97 (1980); Roy M. Speer, 11 FCC Rcd 14147 (1996); Stockholders of CBS, Inc., 11 FCC Rcd 3733 (1995).

39/ 47 C.F.R. § 73.3555(c).